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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-____

CHARLES L. PLATER,

Petitioner,

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF CLAIMS

RICHARD L. SWICK
1025 Vermont Ave., N.W.
Suite 503
Washington, D.C. 20005
202-737-5441

Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW

The question presented for review is whether a civil service employee who is removed from his position is entitled to judicial review when his removal is effected in violation of governing agency regulations?

PARTIES BELOW

The only parties to this proceeding in the court below are those indicated by the caption of this petition.

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OPINIONS BELOW

The order of the Court of Claims dated April 27, 1982, (Appendix, hereinafter, App 1-5) dismissing petitioner's case has not been reported. The administrative decisions of the

Civil Service Commission Federal Employee Appeals Authority and the Merit Systems Protection Board Office of Appeals Review which were the subject under review in the Court of Claims also are not reported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1255(1).

STATUTES AND REGULATIONS

There are set out in the appendix to this petition the following provisions:

Department of the Navy Regulations

NAVORDSTAINST 12000.2A CH-20,

2 April 1976

OCMMINST 12000.1 CH-12? Dec 75

STATEMENT OF THE CASE

Petitioner, Charles Plater, is a 55 year old former GS-5 security guard at the Naval Ordnance Station, Indian

Head, Maryland who began his federal civil service following an honorable discharge from the military on August 22, 1954. Petitioner was involuntarily removed from his position on January 15, 1977, for the alleged attempt to steal Five Dollars ($5.00) worth of government gasoline on the night of December 2, 1977. At issue is the decision of the Court of Claims dismissing the petition in the Court of Claims seeking review of the determination that he would be removed from the federal service and the determination of the Federal Employees Appeals Authority and Merit Systems Protection Board upholding petitioner's removal.

By letter dated 12 December 1977 NAVORDSTA advised petitioner, Charles L. Plater, of his proposed removal from the federal service for attempted theft of government property. By letter dated January 11, 1978, petitioner was advised that his removal would be effective on January 15, 1978.

Petitioner filed a timely appeal of the decision to remove him to the Federal Employee Appeals Authority (FEAA) of the United States Civil Service Commission by letter dated January 19, 1978. In this letter petitioner contended that NAVORDSTA violated its own regulations, that he was innocent, and maintained that his removal was arbitrary and capricious in that other like cases did not result in the imposition of the harsh penalty of

removal. In a decision dated 17 July 1978, the FEAA affirmed the agency's decision to remove the petitioner from Federal Service. By letter dated August 18, 1978, petitioner requested that the Appeals Review Board, United States Civil Service Commission, reopen and reconsider his case. This request contended that the evidence failed to establish that petitioner actually attempted theft of government property, and that violations of established policies occurred rendering the decision arbitrary and capricious. By letter dated June 22, 1979, petitioner was advised that, in accordance with his request, the Merit Systems Protection Board reviewed the administrative record and found that his request did not meet the regulatory

criteria of Sections 772.310 and 772.312 of Title 5, Code of Federal Regulations and therefore his request to reopen the FEAA decision was denied.

On March 2, 1981, petitioner filed suit in the Court of Claims seeking restoration to his civil service employment, expungement of documents relating to his removal, or in the alternative return to the Merit Systems Protection Board to redetermine a lesser penalty.

On September 1, 1981, petitioner moved the Court of Claims for summary judgment in his favor alleging that the adminstrative decisions were not supported by substantial evidence and that the penalty of removal was an abuse of discretion in that it did not promote the efficiency of the federal

service because (a) the agency had failed to abide by its own regulation which required petitioner's supervisor to personally investigate charges against him prior to proposing removal; (b) the agency had failed to abide by its own regulation which required that certain factors be considered before an employee was subjected to removal; and (c) higher level employees had received only minimal punishment for offenses which were more serious.

On November 24, 1981, the United States opposed petitioner's motion for summary judgment and filed a cross-motion for summary judgment contending that the FEAA decision was entitled to finality because (a) the Court of Claims was limited in its scope of review; (b) there had been

compliance with the applicable regulations and that any deviation from the regulation was harmless; (c) the agency action was supported by substantial evidence; and (d) removal was a proper penalty.

On April 27, 1982, the Court of Claims granted defendant's cross-motion for summary judgment and dismissed the petition there, finding that due to its limited scope of review there was no basis to set aside the determination of the FEAA. The Court of Claims did not address petitioner's contention that the government had not complied with the applicable regulations.

REASONS FOR GRANTING THE WRIT

THE COURT OF CLAIMS DECISION IS IMPORTANT AND IN CONFLICT WITH ITS OWN PRIOR RULINGS, RULINGS OF THE COURT AND RULINGS OF THE CIRCUIT COURT

Although the scope of judicial review for administative determinations concerning the removal of civil service employees is extremely limited, the Court of Claims has the authority to reverse agency action which is arbitrary and capricious. Power v. United States, 209 Ct. Cl. 126 (1976); Boyce v. United States, 543 F.2d 1290 (Ct. Cl. 1976); Jacobowitz v. United States, 191 Ct. Cl. 44, 424 F.2d 555 (1970); Daub v. United States, 154 Ct. Cl. 434, 295 F.2d 895 (1961).

The scope of review also permits judicial review and reversal of agency action which is violative of its own

regulation. Service v. Dulles, 354 U.S. 363 (1957); Vitarelli v. Seaton, 359 U.S. 585 (1959); Harris v. United States, 661 F.2d 885 (Ct. Cl. 1981), Brewer v. United States Postal Service, 227 Ct. Cl. , 647 F.2d 1093, 1097 (1981); or which are not supported by substantial evidence; Reil v. United States, 197 Ct. Cl. 542, 456 F.2d 777 (1972); Power v. United States, supra; Young v. Hampton, 658 F.2d 1253 (7th Cir. 1973). Judicial review where an agency has not complied with its own regulations does not involve the Court's substituting its judgment for that of the agency. Instead the Court is requiring the agency to act in consonance with its own regulations. The record before the Court of Claims revealed that the agency removed

petitioner from his employment in contravention of its own regulation. The Court of Claims' failure to address or reconcile this fact effectively, denied the petitioner the judicial means of holding the agency to its regulations and potentially denies that right to any other civil service employee. Therefore, the Court of Claims decision is important and conflicts with prior rulings.

At the time of petitioner's removal from his position, the governing regulation was NAVORDINST 12000.2A 4(a)(4) CH-20, April 2, 1976. This regulation provided that prior to proposing an employee's removal from his position

> "...the supervisor must conduct a thorough investigation to determine whether an offense has been committed and whether some type of disciplinary action is warranted. Interviews should be conducted individually and privately with the employee concerned, other employees or supervisors involved, and any witness. If appropriate, written statements should be obtained and notes taken for use in preparing any formal action which may result. During investigations, employees should be given an opportunity to explain their position and any mitigating circumstances." (Emphasis added).

By requiring the supervisor to "conduct a thorough investigation" complete with an individually and privately conducted interview, the agency grants a right to employees to "be given an opportunity to explain their position and any mitigating circumstances." It was not disputed that nothing in the record before the Court of Claims indicated

that petitioner's supervisor conducted such an investigation or that petitioner was accorded a private individual interview with his supervisor or "opportunity to explain [his] position and any mitigating circumstances" prior to the initiation of disciplinary action by the agency. Accordingly, there was no question that the agency failed to follow its own regulation. The Court of Claims' failure to address this contention therefore denied the petitioner of the means to hold the agency to its regulation.

The agency also failed to abide by the provisions of Paragraph 2, Part III, Chapter II, NAVORDSTAINST 12000.2A which provides:

> "Disciplinary action should be corrective, not punitive, and should be initiated promptly, normally within 15 days after occurrence of the event for which action is being taken. The employee should be told what he did wrong, why it was wrong, and what he should do in the future. The penalty imposed should be the minimum reasonably expected to correct the offending employee and to maintain general discipline and morale in the organization."

This regulation permitted the agency to determine "the minimum [punishment] reasonably expected to correct the offending employee." However, in order to satisfy the requirements of 5 U.S.C. §7512 that the adverse action promote the efficiency of the federal service, this determination cannot be made in a vacuum. To do so is the epitomy of an arbitrary and capricious decision. Another regulation, Paragraph 2-2, OCMMINST 12000.1 provided specific

considerations applicable to allegations of theft. OCMMINST 12000.1 provides:

> "Actual or attempted theft of government property or the property of others. This offense is of such serious nature that removal, under certain circumstances, may be justified; for instance, when there is evidence that there has been collusion, the theft is premeditated, or is not an isolated instance of poor judgment on the part of the employee who has an otherwise unblemished record. The book value, replacement cost or resale value of the items, whether or not restitution is made, etc., ordinarily will not be considered. Employees must be kept informed through supervisory channels, bulletin boards, house organs, etc., that the Department of the Navy will not tolerate theft, and that offenders can expect grave consequences."

The record before the Court of Claims showed that petitioner was a GS-5 nonsupervisory employee with

twenty-four years of completely satisfactory service, with an unblemished record, who was removed for the first offense of the alleged theft, while acting alone, of $5.00 worth of government gasoline. The record before the Court of Claims also showed that in an earlier case, the agency had imposed a one-day suspension on a GS-8 foreman, responsible for property accountability and having the authority to requisition equipment, for the colluded and premeditated theft of $162.85 worth of tools. Since the "minimum [punishment] reasonably expected to correct the offending employee" in the supervisor's case was a one-day suspension, there was no rational basis for imposing the extreme penalty of removal of petitioner. The only rationalization

for the apparent disparate treatment of petitioner proffered by the agency was that petitioner was a GS-5 Guard. However, in view of the express language of OCMMINST 12000.1 and the fact that the GS-8 supervisor was responsible for property accountability and had the authority to requisition equipment, there is no basis for determining that petitioner should have been subjected to an infinitely higher sanction. Had petitioner been suspended for six (6) months or 180 days, his punishment would have been 180 times that given the GS-8 supervisor. Since one (1) day was the "minimum [punishment] reasonably expected to correct" the supervisor, there is no basis for determining removal was necessary for petitioner.

Thus, the agency has violated both OCMMINST 12000.1 and NAVORDSTAINST 12000.2A.

The prejudice to petitioner due to the failure to abide by the provision of OCMMINST 12000.1 that "the penalty imposed should be the minimum reasonably expected to correct the offending employee and to maintain general discipline and morale in the organization" is manifest--had the agency complied there would have been no removal. Thus, the departure from the regulation is clearly not harmless error.

The prejudice to the petitioner resulting from the failure to abide by the provision of NAVODSTAINST 12000.2A(a)(4) is equally clear. Had the agency complied with the regulation

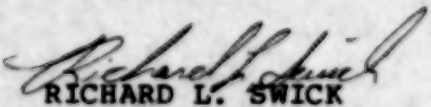
petitioner's supervisor would have personally investigated the charges against petitioner and personally conducted an interview with petitioner. In such an interview, the petitioner would have been able to present his defense and to point out that the gasoline value was only $5.00 and that he had an unblemished record. Petitioner also would have been able to point out the fact that a GS-8 supervisor, who had responsibility for the accountability of property and the authority to requisition equipment and who had colluded with another employee to steal $162.85 worth of tools had received only a one-day suspension. This certainly was a substantial right.

Had the agency complied with this regulation and had petitioner been accorded this opportunity prior to the initiation of disciplinary action, petitioner's removal could well have been avoided. Accordingly, the agency's failure to abide by its own regulations arbitrarily denied petitioner a right conferred by its regulations. The Court of Claims failed to address or reconcile this fact. This was a clear error which potentially deprives a civil service employee of the means of enforcing substantial rights conferred by agency regulations.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,



RICHARD L. SWICK
1025 Vermont Avenue, N. W.
Suite 503
Washington, D. C. 20005
202-727-5441

Attorney for Petitioner